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IN THE

Supreme Court of the United States

CITY OF RANCHO PALOS VERDES, *et al.*,
Petitioners,

v.

MARK J. ABRAMS,
Respondent

On writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, AS *AMICUS CURIAE*, SUPPORTING RESPONDENT

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QUESTION PRESENTED

In enacting the right of an individual to place, construct or modify personal wireless facilities in the Telecommunications Act of 1996 (specifically 47 U.S.C. § 332(c)(7) (B)), did Congress intend to foreclose damages against state and local government officials under 42 U.S.C. § 1983 and attorneys' fees under 42 U.S.C. § 1988(b)?

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INTEREST OF AMICUS CURIAE

Amicus curaie American Mobile Telecommunications Association ("AMTA") is a nationwide affiliation of commercial providers of land mobile and personal wireless services.[1] As such, it and its members are directly affected by the statute here at issue, 47 U.S.C. § 332(c)(7), which Congress enacted in amending the Communications Act of 1934, 47 U.S.C. § 101 *et seq.*, to "promote competition and reduce regulation, to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, Preamble, 110 Stat. 56.

The vast majority of AMTA's members are small, independent, privately owned companies, or individuals. Its members, like respondent Abrams, from time to time apply to municipalities or other local governments for permission regarding "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A). To the extent the service provider's application is acted upon by a planning commission or city council which is hostile to the placement of telecommunications facilities, particularly antenna towers, within its jurisdiction or indifferent to the needs of the service provider to have facilities capable of providing adequate personal wireless services to the public, AMTA's members' interests are adversely affected.

The court may take judicial notice of the enormous increase in the demand for and use of personal wireless

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[1]This brief was authored in part by counsel for respondent. No person or entity, other than AMTA, its members and counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have filed blanket consents with this Court to allows the filing of amicus brief.

services. Cellular telephones, once the exclusive province of wealthy persons or business users, have been so prevalent that many parents require their children to carry them for safety reasons. The newest generations of personal wireless services, so-called third generation wireless, now in the process of authorization by the FCC, will have the capability to provide high speed Internet access and full motion video, bringing us only a few steps away from the wrist "TV/radio" Dick Tracy used in the comic strip we read as children.

The high demand for personal wireless services requires that personal wireless service frequencies be reused within limited areas. This reuse of frequencies necessitates numerous low power sites to avoid intra-system interference. Thus the escalation in demand for personal wireless services has resulted in the need to construct towers in all areas in which the public lives or works or though which it travels. The need to locate towers wherever such facilities are permitted pursuant to the laws of the municipality sometimes engenders substantial public concern. These concerns range from typical zoning issues, such as aesthetics, to concerns regarding the possibility of hazardous exposure to radio wave radiation and sometimes to the improper denial of tower siting approval by a municipality.[2]

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[2]For example, the November 18, 2004 edition of the Western Queens Gazette reports, "More than 100 local parents and concerned residents joined City Council member Peter Vallone Jr. and Assembly member Michael Gianaris at a rally protesting cell phone towers in front of 21-80 21st St, directly across from P.S. 122 in Astoria,[New York] last Friday morning. Parents are concerned about the possible effects of the cell phone towers on the health of their children."

Similarly, in April of this year a personal wireless services company was forced to defend before the California Coastal Commission its permit to place a "stealth" antenna at a residential property in Mendocino County, CA. Stealth antennas are designed to alleviate any adverse visual

Although large wireless companies may have the fortitude and financial wherewithal to survive a public onslaught against their antenna tower applications and the resulting delay or denial of their applications, most of AMTA's members would be incapable of absorbing the expense of pursuing the appeals process and, upon denial, to institute a federal district court or state court action to vindicate their rights under Section 332(c)(7)(B).

If the Petitioner prevail, even if a wronged personal wireless service provider who was willing and able to file a court action under the statute were to be successful in challenging the municipality's decision, the only relief he would be entitled to would be a court order directing the municipality to do what it was required to do in the first place. 42 U.S.C. §§ 1983 and 1988(b) help level the playing field to ensure that justice is not merely for the wealthy. A municipality or other local government would be much more inclined to consider a personal wireless service provider's application fairly and on the merits, knowing that it could otherwise be held liable for the applicant's damages and legal fees resulting from an unlawful denial. Absent such a possibility, a municipality generally opposed to towers would have no incentive to fairly abide by the provisions of 47 U.S.C. § 332(c)(7)(B), particularly in the face of vigorous local public opposition. The politically expedient course for local elected officials would be to sit on a protested application and/or pretextually deny it. In that event a wrongfully delayed or

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impact of an antenna by disguising the antenna to look like a tree or other object, or locating the antenna inside a church steeple, or billboard. The principal issue raised by the petitioners concerned radio frequency exposure. Despite that Section 332(c)(7)(B)(iv) preempts radiation exposure concerns, the California Coastal Commission spent several months researching the appeal before affirming award of the permit. *See* http://safecellularphones.com/article2601.html.

denied applicant likely would abandon its proposed tower site. Suing the local government is likely to be more costly than finding an alternative, though inferior, site, or simply giving up.

AMTA thus submits this amicus curaie brief in support of respondent Mark Abrams.

STATEMENT

A. Factual Background

The factual background of this case is adequately set forth in the briefs filed by the Petitioners and Respondent, and in the Ninth Circuit's opinion. We note that no material facts appear to be in dispute.

B. Statutory Framework

This case requires the Court to interpret the interplay between the 47 U.S.C. § 332(c)(7), 42 U.S.C. § 1983 and 42 U.S.C. § 1988(b). Section 332(c)(7) is part of the Telecommunications Act of 1996 (hereinafter "TCA"). The TCA was enacted "to provide for a pro-competitive de-regulatory national policy framework designed to rapidly accelerate private sector deployment of advanced communications and information technologies and services ... by opening all telecommunications markets to competition." Although generally a preemptive statutory scheme, Congress enacted § 704 of the Act, codified at 47 U.S.C. §332(c)(7), which generally preserves police power zoning jurisdiction over the physical facilities of personal wireless facilities, but nevertheless imposes important limits on State and local governmental authority to restrict or deny operation of wireless personal service facilities.

Section 332(c)(7)(B) provides five specific protections to personal wireless service providers. First, in regulating "the placement, construction, and modification of personal wireless service facilities" states, local governments and instrumentalities thereof may not "unreasonably discriminate among providers of functionally equivalent services;" and may not "prohibit or have the effect of prohibiting the provisions of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i). Second, State and local authorities must act on a tower siting request within a reasonable time, "taking into account the nature and scope of such request." *Id.* at § 332(c)(7)(B)(ii). Third, any denial of a tower siting request must be in writing and supported by substantial evidence. *Id.* at § 332(c)(7)(B)(iii). Fourth, to the extent personal wireless facilities comply with the FCC's radiation exposure regulations, State and local authorities may not regulate such facilities on the basis of possible harm from electromagnetic radiation exposure. *Id.* at § 332(c)(7)(B)(iv). Fifth, Congress gave disappointed applicants for personal wireless tower facilities a federal cause of action to redress a violation of the foregoing rights. *Id.* at § 332(c)(7)(B)(v).

It is the effect of that fifth provision which this case considers. That fifth provision reads as follows:

> (v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or

> instrumentality thereof that is inconsistent with clause (iv) may petition the [Federal Communications] Commission for relief.[3]

Section 332(c)(7)(B) thus grants personal wireless service providers a federal right: (1) not to be subject to unreasonable discrimination in their tower siting requests; (2) to have their tower siting requests acted upon within a reasonable time; (3) to have any denial of their tower siting requests in writing and supported by substantial evidence; and (4) not to have the denial of their tower siting requests based on concern over radiation exposure if they meet the requirements of the FCC's electromagnetic radiation exposure regulations.[4]

The issue to be decided in this case is whether in enacting the federal cause of action set forth in § 332(c)(7)(B)(v) to enforce the rights granted personal service providers, Congress intended to deny the damage remedy available under § 1983 and intended to deny the award of attorneys' fees available to prevailing plaintiffs under § 1988(b).

Section 1983, creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the Constitution and laws" of the United States. It reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

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[3]47 U.S.C. § 332(c)(7)(B)(v).

[4]FCC guidelines for electromagnetic radiation exposure are set forth in a publication entitled OET Bulletin No. 65 (Ed. 97-01), which is available on the FCC's web site at www.fcc.gov/oet/rfsafety.

> subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[5]

Section 1983 is a far reaching statute. It reaches any right, privilege or immunity secured by the Constitution or by federal law. *See Dennis v. Higgins*, 522 U.S. 118 (1997) (coverage of § 1983 must be broadly construed).

Section 1988(b), in turn, provides that the prevailing party, other than the United States, in an action prosecuted under, inter alia, § 1983 may be awarded reasonable attorneys' fees. There is no allegation that respondent, Mr. Abrams was not a prevailing party against Petitioners or that he would otherwise not qualify for attorneys' fees if §§ 1983 and 1988(b) otherwise apply in this case.

Although the statute on its face provides that an award for attorneys' fees is discretionary, it was the plain intent of Congress in passing § 1988(b) that fees be awarded as a matter of course absent circumstances that would make the award unjust. Section 1988(b) was adopted in 1976 in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The provision was intended to close "anomalous gaps in our civil rights laws whereby awards of fees are . . . unavailable." S. Rep. No. 94-1011, at 4 (1976). The Senate Report explained:

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[5]42 U.S.C. § 1983.

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. . . . 'Without counsel fees the grant of Federal jurisdiction is but an empty gesture.' *Hall v. Cole*, 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972).

Id., at 2-3. *See also Zarcone v. Perry*, 581 F. 2d 1039, 1041 (2d Cir. 1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). Thus, awarding fees should be the rule, rather than the exception, with the special circumstances exception applied only in unusual cases. *Ackerley Communications, Inc. v. City of Salem, Oregon*, 752 F. 2d 1394, 1396 (9th Cir. 1985), *cert. denied*, 472 U.S. 1028 (1985).

SUMMARY OF ARGUMENT

This Court's prior decisions hold that an individuals whose rights under a federal statute have been violated may obtain damages against a municipality under § 1983 unless Congress intended to preclude a § 1983 remedy. In the absence of an express preclusion of a § 1983 remedy, this Court will examine the statute to determine whether a Congressional intent to deny § 1983 relief is manifest. Such an intent to preclude a § 1983 remedy will be inferred where a § 1983 remedy is inconsistent with the statutory scheme Congress has crafted, or where the scheme Congress has crafted is so comprehensive as to lead to the conclusion that Congress

intended the remedial statute to be the sole and exclusive remedy to vindicate the denial of federal Constitutional or statutory rights.

As the Act at issue here does not contain any wording which expressly precludes a § 1983 action, petitioners have the specific burden to demonstrate that Congress nevertheless intended to preclude a § 1983 action by establishing that § 332(c)(7)(B) is either inconsistent with a § 1983 remedy or that the statute itself provides for such a comprehensive remedial scheme that it supplants all other remedies, including those under § 1983. The statute is not inconsistent with § 1983 relief. Moreover, although the statute specifies certain procedural requirements, and requires expedited proceedings, § 332(c)(7)(B) does not provide for any remedial scheme at all, comprehensive or otherwise. In the absence of clear explicit or implicit Congressional intent to deny a § 1983 remedy, this Court should avoid any temptation to limit § 1983's reach.

Moreover, allowing an aggrieved party under §332(c)(7)(B)(v) access to § 1983 remedies would further the Congressional intent in enacting the provision. It would encourage local government officials to treat all applicants for siting personal wireless service facilities fairly and in compliance with the Act. This would be consistent with the Act's purpose, to secure lower prices and higher quality services for American telecommunications consumers.

ARGUMENT

Section 1983 states the general rule that persons acting under color of state law who deprive others of any rights under the Constitution or federal law "shall be liable to the party injured." 42 U.S.C. § 1983. The courts have interpreted this statute to allow several types of relief, including damages and

equitable remedies such as injunctions. *See, e.g., Donahue v. Staunton*, 471 F.2d 475, *cert. denied* 410 U.S. 955 (1972). Moreover, § 1988(b) allows the court, to award reasonable attorneys' fees to the prevailing party in a § 1983 action.

Section 1983 applies to deprivations of both Constitutional rights and rights guaranteed under federal law. *Maine v. Thiboutot*, 448 U.S. 1 (1980). Petitioners do not dispute that § 332(c)(7)(B) creates enforceable federal rights. Rather, they suggest that the only source of a remedy available to Mr. Abrams is that available pursuant to § 332(c)(7)(B)(v). That provision, however, merely amounts to a grant of judicial jurisdiction. That provision allows "[a]ny person adversely affected by any final action or failure to act by a State or local government" to file an action with any court of competent jurisdiction and to have the case decided on an expedited basis. 47 U.S.C. §332(c)(7)(B)(v).

This Court's decisions have made it plain that rights granting statutes may be enforced by a § 1983 action unless it is Congress's intent to withhold a § 1983 remedy. As Justice O'Connor's opinion for the Court in *Blessing v. Freestone,* 520 U.S. 329 (1997), explained, petitioners have a "difficult showing" to make that allowing a § 1983 action to go forward "'would be inconsistent with Congress's carefully tailored scheme.'" *Id.* at 346 (quoting *Golden State Transit Corp. v. Los Angeles,* 493 U.S.103, 107 (1989)). In this case, Petitioners have not made that showing.

Petitioners and amici on their behalf seek to make this difficult showing by suggesting that § 1983 relief would be inconsistent with § 332(c)(7), and that § 332(c)(7) is itself a comprehensive remedial statute sufficient to show Congressional intent to exclude a § 1983 remedy. There is nothing, however, in the wording of § 332(c)(7) which is

inconsistent with § 1983. Section 332(c)(7)(B)(v)'s 30-day limitations provision is not inconsistent with § 1983 because § 1983 has no specific limitations period applicable to it. Likewise, the requirement that courts expedite proceedings alleging a violation of the rights granted by § 332(c)(7)(B) is in no way inconsistent with § 1983. And there is no inherent inconsistency between § 332(c)(7)(B) and an award of attorneys' fees under § 1988(b) to a party prevailing against a local governmental instrumentality in an action to enforce rights granted by § 332(c)(7)(B).

Section 332(c)(7)(B) is also not such a comprehensive remedial provision sufficient to give rise to the inference that Congress intended to exclude all other federal remedies. This Court has made such a conclusion in only two cases where Congress carefully spelled out in detail the available remedies it considered necessary to vindicate rights under the statutes in question. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Smith v. Robinson*, 468 U.S. 992 (1984). Here, Congress ensured only that victims of unlawful state and local governmental tower siting decisions would enjoy an expedited judicial proceeding to vindicate their rights. Congress did not identify any specific judicial remedy, however, unlike the two statutes this Court previously has found to have qualified as comprehensive remedial statutes.

A. 42 U.S.C. § 1983 relief is not inconsistent with § 332(c)(7)(B)

Petitioners' argument that § 1983 relief is inconsistent with § 332(c)(7)(B) is unconvincing. Petitioners argue this inconsistency is apparent because § 332(c)(7)(B)(v) contains a 30 day limitation provision, while one normally has four years to bring a claim under § 1983. Petitioners' Brief at 28. That is

simply not an inconsistency. First, as the United States admits (U.S. Brief at note 4), § 1983 contains no limitation period. *See Wilson v. Garcia*, 471 U.S. 261, 266 (1985). Thus, § 1983 can hardly be considered inconsistent with § 332(c)(7)(B) on this basis. The United States, however, maintains that the two acts are inconsistent because state statutes of limitations govern § 1983 actions. U.S. Brief at 23-25 & n. 4, citing *Wilson v. Garcia,* 471 U.S. at 267. The United States misreads *Wilson.* This Court actually said in *Wilson,* "Where Congress has not established a specific limitation for a cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law." *Id.* at 266-67. Here the rights granting statute at issue, § 332(c)(7)(B)(v) contains its own 30-day limitations period. That is perfectly consistent with the statutory scheme of § 1983. In drafting § 1988(a) to govern the litigation of civil rights cases, Congress directed that "'First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.'" *Wilson v. Garcia*, 471 U.S. at 267 (quoting 42 U.S.C. § 1988(a)). To suggest that the inclusion in a rights granting statute of a separate limitations period evidences a Congressional intent to deny § 1983 remedies runs directly contrary to § 1988(a)'s wording and would suggest that § 1983 jurisdiction should be denied merely because in granting a statutory right, Congress coupled it with a specific limitations period to assert that right. That does not logically follow.

Similarly, the suggestion that Section 332(c)(7)(B) is inconsistent with § 1983's (through § 1988(b)'s) attorneys' fees provision is unavailing There is nothing inconsistent with the Act's title, "preservation of local zoning authority," and the award of attorneys' fees for violation of the federal rights

granted by the Act.[6] Nothing is inconsistent between preserving local authority, except where inconsistent with the Act, and providing for attorneys' fees where local government officials violate the Act. The argument of Petitioners and the amici in support is circular: Congress could not have intended to allow the award of damages under § 1983 and attorneys' fees under § 1988(b) because then state and local officials violating § 332(c)(7)(B) would have to pay attorneys' fees.[7] *See* Petitioners Brief at 29-30; U.S. Brief at 22-23. Congress adopted § 1988(b) to provide as a general rule for attorneys' fees awards in cases where state and local governmental officials deny rights guaranteed by federal statute. So it is hardly inconsistent to apply that provision to a rights granting statute such as § 332(c)(7)(B).

In a related argument, Petitioners and amici seem to suggest an unfairness in subjecting local governmental officials to attorneys' fees awards (and presumably damages) due to the nature of the zoning decisions at issue. They suggest local officials should not be subject to such awards for mere

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[6]Likewise, the argument of the United States that it is the "general rule that litigants pay their own attorneys' fees, " Brief at 22-23 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994)), is unavailing. *Fogarty* made clear that the attorneys' fee provision available in suits for copyright infringement, 17 U.S.C. § 505, is truly discretionary. By contrast, the legislative history of § 1988(b) makes it clear that attorneys' fees should be awarded to successful litigants absent unusual circumstances. *Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983); *Williams v. Hanover Housing Authority*, 113 F.3d 1294, 1300-1301 (1st Cir. 1997).

[7]Concern over the award of attorneys' fees appears to be the principal reason for the Seventh Circuit's decision in *Primeco Personal Communications, L.P. v. City of Mequon*, 352 F.3d 1141, 1153 (2003), decided contrary to the Ninth Circuit's decision below. Interestingly, the Seventh Circuit appears not to be troubled by the possibility of a damage remedy for violation of § 332(c)(7)(B). *See id. at 1152-53,* citing *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66-76 (1992).

mistaken judgments in a complex area, that local governments will be cowered in fulfilling their zoning responsibilities, and that huge telecommunications giants will be the beneficiaries of such awards. *See* Petitioners Brief at 29-32; Brief of National League of Cities, et al. at 21-23. The standards local officials must meet to avoid liability, however, are rather lax. They must make a timely decision. They must not unreasonably discriminate. Their decisions must not have the effect of prohibiting personal wireless services. They must make their decisions in writing. And their decisions must have substantial evidentiary support. These modest requirements would hardly serve to intimidate local officials acting in good faith. As to the suggestion that applying § 1983 would have the effect of enriching huge telecommunications concerns at the expense of local governmental services, this case aptly illustrates the more typical situation where it is the small entrepreneur who tends to be ground down by the huge expense of vindicating rights under the statute in question. To the extent a small municipality in good faith is found to have inadvertently violated § 332(c)(7)(B), and would be financially endangered by an attorneys' fee award to a large, well heeled telecommunications enterprise, we have no doubt that situation would suffice as a special circumstance justifying the denial of attorneys' fees under § 1988(b). Suffice it to say, that is not the situation in this case.

Even less convincing is Petitioners' argument that allowing actions seeking § 1983 remedies to enforce rights granted under § 332(c)(7)(B) would be inconsistent with § 332(c)(7)(B) because that statute contains a clause requiring courts to expedite actions to redress violations of the statute. Petitioners' suggestion that the requirement for expedition would be nullified by seeking a § 1983 remedy simply does not follow. Plainly, the meaning of the expedition clause is that actions based on a violation of rights granted under the statute

are to be expedited, including claims for relief under § 1983. There is simply no inconsistency in reading the two statutes that way. Such a reading complies with the basic canon of statutory construction that statutes are to be read in harmony, if practicable. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Plainly then no inconsistency exists between the provisions of §332(c)(7) and §§ 1983 and 1988(b).

B. 47 U.S.C. § 332(c)(7) is not such a comprehensive remedial statute as to show Congress's intent to exclude a § 1983 remedy for its violation

Even where § 1983 relief is not inconsistent with a rights granting statute, Congress may implicitly preclude a § 1983 action by creating a comprehensive enforcement scheme that gives such a full and complete remedy as to demonstrate that Congress nevertheless intended to preclude § 1983 remedies.

This Court has found such comprehensive enforcement schemes in only two cases, *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (hereinafter "*Sea Clammers*"), involving the Federal Water Pollution Control Act ("FWPCA") and the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"), and *Smith v. Robinson*, 468 U.S. 992 (1984), involving the Education for All Handicapped Children Act ("EHA"), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq*.

In *Sea Clammers*, the Court described the enforcement provisions of the FWPCA and MPRSA as "unusually

elaborate." 453 U.S. at 13. Those acts conferred on both government officials and private citizens the right to sue for enforcement. The FWPCA authorized the

> EPA Administrator to respond to violations of the Act with compliance orders and civil suits. . . . He may seek a civil penalty of up to $10,000 per day . . . and criminal penalties are available. . . . States desiring to administer their own permit programs must demonstrate that state officials possess adequate authority to abate violations through civil or criminal penalties or other means of enforcement. . . . In addition, under § 509(b), 33 U.S.C. § 1369(b), 'any interested person' may seek judicial review in the United States courts of appeals of various particular actions by the Administrator, including establishment of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement.

Sea Clammers, 453 U.S. at 14-15 (citations omitted).

The Court continued that the foregoing enforcement mechanisms, which for the most part had their counterparts in the MPRSA, "are supplemented by the express citizen-suit provisions" in both acts, which "authorize private persons to sue for injunctions to enforce these statutes," subject to plaintiffs complying with certain specific procedures, including giving prior notice to potential defendants. *Id.* at 14.

In light of these elaborate enforcement mechanisms, the Court could not assume "that Congress intended to authorize by

implication additional judicial remedies for private citizens suing under [those Acts]." *Id.*

In *Smith v. Robinson*, 468 U.S. 992, the Court held that Congress intended a claim that a child was being discriminated against on the basis of his handicapped condition, in violation of the Equal Protection Clause of the Fourteenth Amendment, to be asserted only pursuant EHA. The Court thus held that relief based on § 1983, including attorneys' fees under § 1988(b), was not available on that constitutional claim. In so holding, the Court was required to discuss "the elaborate substantive and procedural requirements of the EHA." *Id.* at 1006.

The Court explained that the EHA was a comprehensive scheme set up by Congress to aid the States in complying with their "constitutional obligations to provide public education for handicapped children." *Id.* at 1009. Both the statutory provisions and its legislative history:

> indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanisms set out in the statute.

Id. The Court emphasized that the EHA "was an attempt to relieve the burden placed on States and localities by their responsibility to provide education for all handicapped children." *Id.* at 1010 (citing 20 U.S.C. §§ 1400(b)(8) and (9)). The Court further explained that the Act established "an elaborate procedural mechanism to protect the rights of handicapped children." *Id.* These procedures required fair and adequate hearings conducted by the State. *Id.* Moreover, it

was the intent of Congress "that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review. §§ 1412(4), 1414(a)(5), 1415." *Smith v. Robinson*, 368 U.S. at 1011.

In fact a review of 20 U.S.C. § 1415 (Procedural safeguards), shows plainly what this Court meant by a carefully tailored administrative and judicial scheme.

Section 1415(b)(1) and (2) requires states to adopt procedures to allow parents or an appointed independent surrogate to inspect all records relating to the child and to participate in meetings with respect to the identification, evaluation and educational placement of the child, and the provision of a free appropriate public education to such child (hereinafter collectively "Educational Plan"), and to obtain an independent educational evaluation of the child. Section 1415(b)(3) requires the parents to receive written notice whenever the agency proposes or refuses to initiate a change in the child's Educational Plan. That notice must meet the detailed requirements of § 1415(c)(1)-(7). Section 1415(b)(5) requires that the state have in place procedures for mediation in accordance with § 1415(e), where the requirements for mediation are in turn detailed. Section 1415(b)(6) requires that the state have in place procedures for the presentation of complaints with respect to the child's Educational Plan. Section 1415(b)(7) sets forth detailed notice provisions with respect to such complaints filed on behalf of the child. Section 1415(b)(8) requires states to develop a model form of complaint for use of parents or surrogates.

The statute further provides for an impartial due process hearing on complaints, with mandatory advance disclosure of

evaluations and recommendations parties intend to use, with the proviso that such hearings may not be conducted by an employee of the state educational agency or the local educational agency involved in the education or care of the child. § 1415 (f). Section 1415(g), in turn, provides for appeals from local hearings to the state educational agency. Moreover, § 1415(h) provides for a variety of safeguards at such hearings, including the right to counsel and consultation with experts, the right to present evidence, compulsory process for witnesses, the right to confront and cross examine adverse witnesses, the right to a transcript of proceedings, the right to a written or electronic findings of fact and decision. Section 1415(i)(2) provides for the right of an aggrieved party to bring a civil action in a state or federal district court without regard of the amount in controversy, and empowers the court to "grant such relief as the court determines is appropriate." Moreover, that provision specifies that the court's decision shall be based on the preponderance of the evidence standard. In addition, § 1415(i)(3) provides detailed provisions with respect to the award of attorneys' fees. Other provisions in § 1415 govern maintenance of current educational placement during pendency of proceedings, the authority to place a child in an alternative educational setting, the authority of a hearing officer to order a change in the placement of a child with a disability to an interim alternative educational setting, the handling of disciplinary actions where behavior may result from a manifestation of the disability, including the right of the parents to appeal, and placement during appeals. *See* § 1415((j)-(k)(1)-(7).

Given the breadth and depth of the EHA, it is easy to understand the Court's holding in *Smith v. Robinson* that the statute was a comprehensive scheme to enforce the right of a disabled child to a free public education, sufficient to rebut the presumption that § 1983 remedies would also be available. The

Congressional scheme contemplated several layers of administrative proceedings. These administrative proceedings were essential to effecting Congress's goal to ensure an equal free public education for disabled children. The administrative proceedings applied to virtually all aspects of the child's Educational Plan. Congress further mandated detailed due process protections for these proceedings, including appeals therefrom. Congress not only specified that aggrieved parties had a cause of action in federal and state court, but specified the burden of proof. Most importantly, the EHA specifically empowered the court to grant all appropriate relief, and the Act specifically and in detail set out when attorneys' fees would be available against the state or local authorities. As the Court explained in *Blessing v. Freestone*, "We reasoned that Congress could not possibly have wanted parents to skip these procedures and go straight to court by way of § 1983, since that would have 'rendered superfluous most of the detailed procedural protections outlined in the statute,'" 520 U.S. at 347 (quoting in part from *Smith v. Robinson*, 468 U.S. at 1011).

By contrast, § 332(c)(7) is not in any way the type of comprehensive and remedial regimes at issue in *Sea Clammers* and *Smith v. Robinson.*[8] Section 332(c)(7), unlike the other statutes, specifies no specific remedies. It merely provides that there will be a judicial forum available to redress violations of

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[8]Citing various provisions for the regulation of common carriers, Petitioners suggest that the Court consider the Communications Act, 47 U.S.C. § 101 *et seq.* as a whole to be a comprehensive remedial regime. Petitioners' Brief at 24-25. The Court should decline to do so. The Communications Act is certainly a comprehensive scheme for the regulation of the communications industry. It is certainly not a comprehensive scheme for the regulation of state and local zoning decisions, and the existence of various unrelated regulatory provisions applicable to the telecommunications industry cannot under any logical reasoning transform § 332(c)(7)(B) into a comprehensive remedial provision.

the Act. Contrary to indicating that Congress desired to exclude a § 1983 remedy, the specific inclusion of the cause of action provision in § 332(c)(7)(B)(v) serves merely to remove any doubt that § 332(c)(7)(B) is in fact a rights granting statute. Previous decisions of this Court have labored over that very issue of whether a cause of action should be implied under § 1983. *See, e.g., Gonzaga University v. Doe,* 536 U.S. 273 (2002); *Blessing v. Freestone,* 520 U.S. 329; *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432 (1987)(O'Connor, J., dissenting). Here Congress made that job easy for the courts by specifically authorizing a cause of action.

As the Ninth Circuit held below, § 332(c)(7)(B) provides no remedy. This is in plain contrast to the statute in *Sea Clammers* that provided for injunctive relief, and the statute in *Smith v. Robinson* that provided for "appropriate relief" and attorneys' fees. Section 1983, however, has been specifically denominated as a remedies statute. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979) (quoting Senator Edmunds: "It only gives a remedy"). *See also Albright v. Oliver*, 510 U.S. 267, 271 (1994) (section 1983 merely provides a method for vindicating federal rights elsewhere conferred).

Nevertheless, the United States suggests that in the absence of an express grant of remedies, § 332(c)(7)(B) should be read to include at least an implied remedy of injunctive relief. U.S. Brief at 16. Suffice it to say that argument hardly should persuade this Court that § 332(c)(7) qualifies as a comprehensive remedial statute. Moreover, an injunction is not a remedy at all. It does not redress an injury. It merely stops further damage. *See Cruz v. American Airlines, Inc.*, 356 F.3d 320, 328 (D.C. Cir. 2004) (injunction will not redress concrete injury plaintiffs have already suffered). *Mitchell v. United States,* 219 Ct. Cl. 95, 591 F.2d 1300, 1302 (1979), *reversed*

on other grounds and remanded, 445 U.S. 535 (1980), *on remand*, 229 Ct. Cl. 1, 664 F.2d 265 (1981) (en banc), *affirmed and remanded*,463 U.S. 206 (1983) (injunction would be meaningless for damage already done). A full and comprehensive remedy would include a damage remedy, which § 1983 provides. Given the existence of § 1983, a generally applicable statute providing remedies for violation of federally granted rights, it would appear reaching to conclude that it is necessary to infer such remedies to avoid application of § 1983.

Section 332(c)(7)(B)(v) provides only that an aggrieved wireless provider has the right to file an action, subject to certain procedural limitations and requirements. No provision is made for any specific remedy or enforcement option, or for any administrative review, detailed or otherwise. Thus, the circumstances which existed in *Sea Clammers* and *Smith v. Robinson* simply do not exist in this case to lead to the conclusion that Congress intended to close the door on § 1983.

A Congressional intent to preclude a § 1983 remedy cannot be found in the legislative history of § 332(c)(7)(B)(v). The Conference Report made it clear that § 332(c)(7)(B)(v) was enacted to provide a "mechanism for judicial relief from zoning decisions that fail to comply with the provisions" of § 332(c)(7)(B)(i)-(iii). H.R. Rep. No. 104-458, 104th Congress, 2d Sess. 208 (1996). It was the intent of the conferees to provide the courts with "exclusive jurisdiction" over all disputes arising under § 332(c)(7)(B) (except § 332(c)(7)(B)(iv)). *Id.* Rather than providing a comprehensive remedial scheme, the conferees gave an injured party the option of bringing an action either in the "Federal district court in which the facilities are located or a State court of competent jurisdiction" without "waiting for the exhaustion of an independent State court remedy otherwise required." *Id.* at

209. The conferees did not specify either the type of action that could be brought or the type of remedy that could be provided.

CONCLUSION.

For the reasons discussed above, this Court should hold that Congress did not intend to exclude § 1983 remedies in a proceeding for enforcement of § 332(c)(7)(B) of the Communications Act. Accordingly this Court should affirm the Ninth Circuit's decision below.

Respectfully submitted,

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